

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

NOV 30 1995

In the Matter of )

Revision of Rules and Policies for the )  
Direct Broadcast Satellite Service )

IB Docket No. 95-168

PP Docket No. 93-253

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF  
LIFETIME ENTERTAINMENT SERVICES**

Peter D. Ross  
Wayne D. Johnsen

Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7000

Its Attorneys

November 30, 1995

## TABLE OF CONTENTS

	<u>PAGE</u>
I. THE COMMISSION LACKS STATUTORY AUTHORITY TO EXTEND PROGRAM ACCESS RULES TO PROGRAMMERS NOT OWNED BY CABLE OPERATORS. . . . .	2
II. EXTENDING PROGRAM ACCESS RULES BEYOND THEIR STATUTORY AND LOGICAL LIMITS WOULD ONLY SERVE TO HARM THE PROGRAMMING MARKETPLACE . . . . .	4
III. CONCLUSION . . . . .	6

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

NOV 30 1995

In the Matter of )  
Revision of Rules and Policies for the ) IB Docket No. 95-168  
Direct Broadcast Satellite Service ) PP Docket No. 93-253

**REPLY COMMENTS OF  
LIFETIME ENTERTAINMENT SERVICES**

Lifetime Entertainment Services ("Lifetime"), by its attorneys, hereby submits reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding. Lifetime joins this proceeding now to respond to a suggestion in two comments that the Commission can and should extend the application of program access rules to programmers that are not affiliated with cable operators.<sup>1</sup> Lifetime wishes to reaffirm that absolutely no statutory authority exists for imposing program access rules on non-vertically integrated programmers. Further, Lifetime submits that there is no sound public policy reason for the FCC to seek authority to extend the rules to cover unaffiliated programmers, as such an effort would needlessly burden already disadvantaged independent programmers and convert a constraint on cable operators into an unprecedented direct regulation of the wholesale programming marketplace.

Lifetime is an advertiser-supported programming service provider that is not affiliated with any cable operator.<sup>2</sup> Lifetime has been able to obtain tremendous audience

---

<sup>1</sup>See 47 U.S.C.A. § 628(b) (1995 supplement) (the "program access" rules).

<sup>2</sup> Lifetime is a joint venture of The Hearst Corporation and Capital Cities/ABC Video Enterprises, Inc., a wholly-owned subsidiary of Capital Cities/ABC, Inc. (which has entered into an agreement to be acquired by The Walt Disney Company).

growth by delivering high quality contemporary, innovative entertainment and informational programming of particular interest to women -- an audience that Lifetime believes has been largely underserved by other programmers. Because approximately 70% of Lifetime's revenues are derived from advertising, Lifetime is committed to maximizing its audience reach. Accordingly, Lifetime has long made its programming available to all distributors, including direct broadcast satellite ("DBS") operators. Lifetime thus eagerly welcomes new competition, but it does not welcome any undermining of the viability of independent programmers through an extension of the program access rules that would lack any statutory basis or pro-competitive purpose.

**I. The Commission Lacks Statutory Authority to Extend Program Access Rules to Programmers Not Owned by Cable Operators**

Two comments in this proceeding suggest that the FCC can and should extend the program access rules of the 1992 Cable Act<sup>3</sup> to cover non-vertically integrated programming services.<sup>4</sup> This suggestion completely ignores the express language, purpose, and legislative history of the 1992 Cable Act's program access rules. Whatever uncertainties may exist regarding application of the program access rules to cable-owned programmers, there can be no serious debate about the Commission's lack of statutory

---

<sup>3</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter "1992 Cable Act" or "Cable Act").

<sup>4</sup> See Comments of BellSouth Corp. at 9; Comments of EchoStar Satellite Corp. and DirectSat Corp. (hereinafter "EchoStar") at 49.

authority to impose access rules on programmers in which cable operators have no attributable interest.<sup>5</sup>

The Commission's lack of statutory authority to extend program access rules to non-vertically integrated programmers is manifest in the express language of the Cable Act. The Act limits application of the rules to satellite cable programmers "*in which a cable operator has an attributable interest*."<sup>6</sup> Indeed, both comments seeking to extend the rules essentially concede this.<sup>7</sup> Even in pointing out that the Cable Act sets forth only the "minimum contents" of program access regulations,<sup>8</sup> these commenters cannot escape the recognition that the scope of these regulations nonetheless remains limited to "cable operators and *affiliated* programmers."<sup>9</sup>

---

<sup>5</sup> Lifetime has made this point in previous comments filed with the Commission. See, e.g., Comments of Lifetime (filed June 30, 1995) and Reply Comments of Lifetime (filed July 28, 1995) in response to the Commission's Notice of Inquiry in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 10 FCC Rcd 7805 (1995) ("NOI"). In that proceeding, even proponents of extending the scope of program access rules conceded that the FCC lacks the statutory authority to apply the rules to non-vertically integrated programmers and that the Commission was essentially asking in its NOI whether it should request that Congress provide such authority. See, e.g., Comments of The Wireless Cable Association International, Inc. ("WCA") at 18; see also Comments of Viacom Inc. ("Viacom") at 3, n.3.

<sup>6</sup> § 628(b) (emphasis added).

<sup>7</sup> BellSouth acknowledges that the 1992 Cable Act "by [its] terms only appl[ies] to satellite-delivered cable programming sold by vendors who are vertically integrated with the cable industry." BellSouth at 8; see also EchoStar at 50.

<sup>8</sup> See EchoStar at 50.

<sup>9</sup> Id. (emphasis added).

The express statutory purpose of the program access prohibition permits no other reading. Program access was mandated because of the belief that vertically integrated program suppliers "have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."<sup>10</sup> Congress thus sought to check the perceived ability of vertically integrated cable operators to leverage their ownership of popular program services to impede the development of competing distributors. The legislative history of the Cable Act only reaffirms the Act's operative language and express purpose, and proponents of extending the rules offer no evidence to the contrary.

**II. Extending Program Access Rules Beyond Their Statutory and Logical Limits Would Only Serve to Harm the Programming Marketplace**

There exists no sound policy rationale for the Commission to seek authority to stretch program access rules to reach beyond their logical and equitable limits and thereby encumber a very dynamic and competitive marketplace for video program services. Extending the rules to independent programmers would convert a policy strictly designed to limit cable market power into a full and sweeping regulation of the wholesale pricing of video programming -- a prospect the Commission could not and should not welcome.

The record reveals no demonstrated, much less compelling, need to motivate independent programmers to deal fairly with alternative distributors. The primary goal of program services not owned by cable operators, particularly advertiser-supported services

---

<sup>10</sup> § 2(a)(5).

such as Lifetime, is to maximize distribution. Thus, Lifetime has long made its programming available to all distribution technologies. Indeed, independent programmers lack not only the incentive but also the ability to impede competition in the distribution marketplace. In short, Lifetime's stake in the emergence of vigorous competition in the distribution marketplace is to promote it, not impede it.

Moreover, commenters urging extension of the rules do not address the harm to independent program services that may arise as a result. These commenters submit that cable operators are able to use a programmer's need for cable carriage to their advantage when negotiating carriage agreements even with non-vertically integrated programmers.<sup>11</sup> By urging the Commission to extend the program access rules to non-vertically integrated programmers, however, these commenters seek not to eliminate the perceived negotiating leverage of cable multiple system operators, but rather to gain such leverage for themselves.<sup>12</sup> Independent programmers cannot maintain a business, much less attract investment to support expanded program offerings, if the government mandates a below-market price for all customers. To the extent that cable market power skews the video marketplace, public policy should seek to invigorate that marketplace, not penalize its victims.

---

<sup>11</sup> EchoStar at 49.


<sup>12</sup> See also Comments of BellSouth at 9.

### III. Conclusion

Lifetime asserts that the Commission should dismiss suggestions that it can extend the reach of program access rules to non-vertically integrated programmers. Congress clearly intended that program access rules not be imposed on independent programmers, and thus the 1992 Cable Act provided the Commission with no authority to do so. Further, as a matter of policy, the Commission should not seek any such authority to so apply its rules. Lifetime submits that it would defy express statutory language, Congressional intent, and logic to impose such rules on independent programmers that not only enjoy none of the potential benefits available to vertically integrated programmers, but are in fact struggling to maximize distribution in the marketplace.

Respectfully submitted,

LIFETIME ENTERTAINMENT SERVICES

By:   
Peter D. Ross  
Wayne D. Johnsen

of

Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7000

Its Attorneys

November 30, 1995